

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

March 25, 2011

Roger D. Landon, Esquire
Philip T. Edwards, Esquire
Murphy & Landon
1011 Centre Road, Suite 210
Wilmington, Delaware 19805

Michael R. Abbott, Esquire
Kent & McBride, P.C.
825 North Market Street, Suite 805
Wilmington, Delaware 19801

**Re: *Middlesex Mutual Assurance Company, et al. v. Delaware Electric
Signal Company;*
C.A. No. 07C-12-005 THG**

Submitted: December 6, 2010

Decided: March 25, 2011

On Defendant Delaware Electric Signal Company's
Supplemental Motion for Summary Judgment:

GRANTED

Dear Counsel:

Pending before the Court is Defendant Delaware Electric Signal Company's Supplemental Motion for Summary Judgment. For the reasons stated herein, that motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second Motion for Summary Judgment filed by Delaware Electric Signal Company ("Delaware Signal"). The first resulted in the dismissal of all of Plaintiffs' claims, with the exception of a claim based upon Delaware's Consumer Fraud Act ("CFA"). The relevant facts are laid out in that decision:

On or about December 6, 2005, a fire began in and spread through the Cedar Shores Condominium complex, located in Bethany Beach, Sussex County, Delaware. At the time the fire broke out, a fire alarm system designed, installed, and monitored by Delaware Electric Signal Company (“Delaware Signal”) was in place. The fire alarm system was designed, installed, and monitored pursuant to a contract entered into by Cedar Shores Condominium Association (“Cedar Shores”) and Delaware Signal on or about October 30, 1997. At the time of the fire, Middlesex Mutual Assurance Company (“Middlesex”) insured the buildings that comprise the Cedar Shores Condominium complex. The fire resulted in the complete destruction of one of the complex’s buildings and damage to several of the complex’s other buildings and structures. Pursuant to the terms of the Middlesex policy, Cedar Shores was required to pay for the first \$5,000.00 of the loss as a deductible.

On December 5, 2007, Middlesex and Cedar Shores (collectively, “Plaintiffs”) filed a seven-count Complaint against Delaware Signal. The first five counts allege Delaware Signal improperly designed, installed, modified and monitored the fire alarm system and that these failures support findings of breach of contract and negligence. Plaintiffs also allege Delaware Signal engaged in consumer fraud in that it misrepresented, concealed, suppressed and/or omitted relevant material facts with regard to how the fire alarm system would be installed and monitored. Finally, Plaintiffs contend Delaware Signal is strictly liable for the damages arising out of the fire because the fire resulted from Delaware Signal’s lease of defective equipment to Cedar Shores.¹

The Court dismissed Plaintiffs’ claims that Delaware Signal breached its contract with Plaintiffs and that Delaware Signal breached any duty owed to Plaintiffs. The Court also dismissed Plaintiffs’ claim that Delaware Signal was liable pursuant to a theory of strict liability. In so doing, the Court concluded the waiver of claims/subrogation clause contained in the contract to be enforceable. However, the Court reasoned that, while the limitation of liability/liquidation damages clause contained in the contract applied to claims arising out of the parties’ contractual obligations, it did not necessarily bar claims arising out of the parties’ contract negotiations. As a result, the Court concluded the matter was not yet ripe for decision. After discovery was completed, Delaware Signal filed the pending Supplemental Motion for

Summary Judgment as to the remaining count. The parties have fully briefed the issue and the matter is now ripe for review.

DISCUSSION

Standard of Review

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.² The moving party bears the burden of establishing the non-existence of material issues of fact.³ Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁴ Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁵ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.⁶ “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”⁷ If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.⁸

Merits

Delaware Signal argues it is entitled to summary judgment on Plaintiffs’ remaining claim because the record is “devoid of any facts detailing any misrepresentations, concealments, suppressions, or omissions or the timing thereof” on its part. Plaintiffs counter that they have, in fact, established a prima facie case of a violation of Delaware’s Consumer Fraud Act.

Section 2513 of Title 6 of the Delaware Code reads, in pertinent part,

The act, use or employment of any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.⁹

Plaintiffs specifically contend Delaware Signal has misrepresented, concealed, suppressed and/or omitted relevant material facts with regard to the capability of the fire alarm system, the identity of who or what entity would be responsible in the event of a fire, and what obligations each party would have following such a loss.

The evidence before the Court reveals the following. Wanda Vigna, a resident of the Cedar Shores Condominium Complex (the “Complex”) and a member of Cedar Shores, volunteered to assist Cedar Shores in purchasing/leasing a fire alarm system for the Complex. Ms. Vigna contacted several fire alarm vendors and secured proposals from at least three companies. Ms. Vigna met with a representative of Delaware Signal to discuss Cedar Shores’ needs. Ms. Vigna testified at her deposition that Cedar Shores was most concerned that the system would report to a central system or notify someone off-premises of an alarm. Cedar Shores had this concern because many of the Complex’s residents were seasonal and not predictably on site. Ms. Vigna testified she was not sure the identity of the person with whom she met from Delaware Signal. She further testified she did not have any memory of what the Delaware Signal representative told her during their initial meeting and walk-through of the property. She was not present during any conversation that may have taken place between any other Cedar Shores members or other owners concerning the fire alarm system. Ms. Vigna testified she did not know if she read the entire contract before signing it on Cedar Shores’

behalf. At some point, the fire alarm system was modified at an additional cost due to the number of false alarms. Ms. Vigna testified, to her knowledge, the work requested to be completed by Delaware Signal was, in fact, completed. She was unable to recall the substance of her conversation(s) with Anthony Abbate, the president and CEO of Delaware Signal.¹⁰ Ms. Vigna is not aware of how the fire that resulted in this litigation started. Ms. Vigna does believe that she would “not have pursued this contract [with Delaware Signal] if [Mr. Abbate] had not stated to [her] that he could meet the conditions that we wanted.”¹¹

Robert Klopfenstein, a Cedar Shores member, testified Cedar Shores started looking for a fire alarm system after there was a fire in one of the condominium units. Cedar Shores appointed member Ms. Vigna the point person for investigating fire alarm companies and she was to report her findings back to Cedar Shores. Mr. Klopfenstein testified Ms. Vigna “did everything” with regard to securing a fire alarm company.¹² He met with a representative from Delaware Signal but he is not sure if he met with the representative before or after the contract was signed. He believes he met with Mr. Abbate at a Cedar Shores meeting that took place prior to the installation of the alarm system. Mr. Klopfenstein does not recall the specifics of the discussion. Looking at the contract documents did not refresh his memory. He does not recall whether he saw the contract before it was signed, whether he reviewed it or whether he had any questions regarding its terms. Mr. Klopfenstein testified that there was an “indication” that “our buildings would be totally protected in all situations” pursuant to the contract.¹³ He cannot recall if Mr. Abbate said that to him or if Ms. Vigna said that to him. He cannot recall if *anyone* said this to him or if it was his “impression.”¹⁴ After a number of false alarms, the fire marshal came to Cedar Shores and indicated they would be charged for the false alarms. Cedar Shores went ahead and made plans for replacing smoke detectors with heat detectors. Mr. Klopfenstein was

not personally involved in the negotiations with Delaware Signal. His general recollection of his conversation(s) with Mr. Abbate is that the substance thereof involved “how the fire system would work, the cost involved with the fire system and how each unit at each building would be protected.”¹⁵ Mr. Abbate did not explain how the system worked to Mr. Klopfenstein.

Mr. Abbate testified he does not recall meeting with Ms. Vigna, though he acknowledges it is clear from his notes that he did. He remembers taking a tour of the Complex prior to entering into the contract. He testified he does not remember making any specific representations regarding the quality of the system or the capabilities of the system that was going to be installed. Mr. Abbate testified,

There is usually, you know, a verbal format that I follow, questions I ask, you know, routine questions. And an overview of the system, you know, we’re going to install this here and here. When the device activates, it’s going to sound the bells here, it’s going to send a signal to central station and then by law we have to call the fire department, you know, and so on. That’s the standard.¹⁶

Mr. Abbate stated he does not recall making any assurances or promises to any individual from Cedar Shores regarding the usual response time of the fire department.

Delaware Signal argues the testimony in evidence does not establish that anyone involved in the sale of the fire alarm system to Cedar Shores has any recollection of the specifics of the contract negotiation and, therefore, Plaintiffs have failed to make a sufficient showing of the existence of an essential element of their case: to wit, that Delaware Signal made any misrepresentation or omission. The Court agrees.

The case at bar differs significantly from the one cited by Plaintiffs, *In re Brandywine Volkswagen, Ltd.*, where “the undisputed record show[ed] an untrue statement made by Brandywine in connection with an anticipated sale and Brandywine’s having had within its possession material from which the untruth of the statement could have been ascertained.”¹⁷ In

this case, Plaintiffs seek to prove there was a limitation in the contract between the parties as to the capability of the fire alarm system and a misrepresentation or omission was made to Ms. Vigna as to that contract term. At this stage of the proceedings, Plaintiffs must allege some facts that cast dispute on Delaware Signal's position. They fail to do so: there is simply no evidence any such misrepresentation or omission occurred. Moreover, Ms. Vigna's testimony that she failed to read the contract, which clearly states that Cedar Shores has not relied on any representations or warranties, except as set forth within the contract itself,¹⁸ is not a defense.¹⁹ Defendant's Supplemental Motion for Summary Judgment is granted.

CONCLUSION

For the reasons set forth herein, Delaware Signal's Supplemental Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary

1. *Middlesex Mut. Assurance Co. v. Delaware Elec. Signal Co.*, 2008 WL 4216145, at *1 (Del. Super.).
2. *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).
3. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
4. *Id.* at 681.
5. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).
6. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

7. *Id.* at 59 (quoting *Celotex*, 477 U.S. at 322-23).
8. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
9. 6 *Del. C.* § 2513(a).
10. Ms. Vigna testified she was not sure if she had conversed with Mr. Abbate after their initial meeting. If she had, she believed they spoke by telephone and not in person.
11. Deposition of Wanda Vigna, at p. 72.
12. Deposition of Robert D. Klopfenstein, at p. 12.
13. *Id.*, at p. 24.
14. *Id.*, at pp. 24-25.
15. *Id.*, at p. 37.
16. Deposition of Anthony John Abbate, at p. 15.
17. 306 A.2d 24, 29 (Del. Super. 1973).
18. The contract contained the following language just above the signature line:

(4) DELAWARE SIGNAL'S LIABILITY. Delaware Signal does not represent or warrant that the alarm system may not be compromised or circumvented; that the system will prevent any loss by burglary, hold-up, fire or otherwise; or that the system will in all cases provide the protection for which it is installed or intended. Subscriber acknowledges that Delaware Signal is not an insurer, that Subscriber assumes all risk for loss or damage to Subscriber's premises or to its contents; that Delaware Signal has made no representations or warranties, nor has Subscriber relied on any representations or warranties, express or implied, except as set forth herein and Subscriber acknowledges that he has read and understands, particularly paragraphs 18 and 19 of this agreement which sets [sic] forth Delaware Signal's obligation and maximum liability in the event of any loss or damage to Subscriber.

Paragraphs 18 and 19 are printed on the reverse side of the contract. Paragraph 18 is irrelevant to the dispute between the parties. However, Paragraph 19 is relevant and reads as follows:

(19) DELAWARE SIGNAL NOT AN INSURER AND LIQUIDATED DAMAGES. It is understood and agreed by and between the parties hereto that Delaware Signal is not an insurer. Insurance, if any [sic] will be

obtained by the Subscriber. Charges are based solely upon the value of the services provided for, and are unrelated to the value to the Subscriber's property or the property of others located in Subscriber's premises. The amounts payable by the Subscriber are not sufficient to warrant Delaware Signal assuming any risk of consequential or other damages to the Subscriber due to Delaware Signal's negligence or failure to perform. The Subscriber does not desire this contract to provide for the liability of Delaware Signal and Subscriber agrees that Delaware Signal shall not be liable for loss or damage due directly or indirectly to any occurrence or consequences therefrom, which the service is designed to detect or avert. From the nature of the services to be performed, it is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from the failure on the part of Delaware Signal to perform any of its obligations hereunder, or the failure of the system to properly [sic] operate with the resulting loss to the Subscriber. If Delaware Signal should be found liable for loss of damage due to a failure on the part of Delaware Signal or its systems, in any respect, its liability shall be limited to the refund to Subscriber of an amount equal to the aggregate of six (6) monthly payments, or to the sum of Two Hundred Fifty (\$250.00) Dollars, whichever shall be less, as liquidated damages and not as a penalty, and this liability shall be exclusive. The provisions of this paragraph shall apply in the event loss or damage, irrespective of cause or origin, results directly or indirectly to person or property from the performance or non-performance of the obligations set forth by the terms of this contract, or from negligence, active, or otherwise, of Delaware Signal, its agents or employees.

19. *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989).